No. 05-927

FEB 23 2006
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IN THE

Supreme Court of the United States

NATIONAL FEDERATION OF THE BLIND;
SPECIAL OLYMPICS MARYLAND, INC.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS BRIEF OF VETERANS FIRST IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI BY NATIONAL FEDERATION OF THE BLIND

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February 23, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF *AMICUS*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
A. The Fourth Circuit Panel Majority Abandoned The Strict Scrutiny Standard Of Review Applicable To Charitable Speech Regulations Under The First Amendment	4
B. The Fourth Circuit Panel Majority Absolved The Government From Any Evidentiary Burden To Support Charitable Speech Regulation	5
C. The Fourth Circuit Panel Majority Failed To Properly Consider, Or Apply, The Promise Of Equal Protection	6
D. A Sample Of The Constitutional Havoc The Fourth Circuit's Decision Has Already Wrought: *Fraternal Order Of Police v. Stenehjem*	8
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Adarand Constructors v. Pena, 515 U.S. 200 (1995) 6-7
Bolling v. Sharpe, 347 U.S. 497 (1954) 6
Fraternal Order of Police v. Stenehjem, 431 F. 3d 591 (8th Cir. 2005) 4, 5, 8-12
Hirabayoshi v. United States, 323 U.S. 81 (1943) .. 7
Illinois ex rel Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (1998) 6
Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32 (1999) 10
Mainstream Marketing Services Inc. v. Federal Trade Comm'n, 358 F. 3d 1228 (10th Cir. 2004) 4, 5, 11
McConnell v. Federal Election Com'n, 540 U.S. 93 (2003) 54
Nat'l Fed'n of the Blind v. Federal Trade Comm'n, 420 F. 3d 331 (4th Cir. 2005) ..... *passim*
Riley v. National Federation of Blind of N.C., Inc., 487 U.S. 781 (1988) 7, 11
Rostker v. Goldberg, 453 U.S. 57 (1981) 6
Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984) ... 6
Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) 10
United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 4-6

OTHER

68 Fed. Reg. 4580 (2003) 11

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STATEMENT OF *AMICUS*

Amicus Veterans First is a small non-profit organization dedicated to providing Veterans in Orange County, California, with assistance in finding jobs and housing.[1] As a small charity of limited prominence, Veterans First does not have a

[1] No counsel for any of the parties below has authored the present brief, in whole or in part. In addition to Veterans First, former Board member Mark Gombar has contributed financially to Veterans First for the purpose of assisting with the expenses associated with the preparation of this brief.

sufficient infrastructure to staff education and fundraising activities of a significant scale. Accordingly, Veterans First values its right to rely as needed on outsourced telephone outreach by professional fundraisers (sometimes referred to as "telefunders"), should it ever conclude that its mission demands a greater voice. All parties to the case below have consented to the filing of the present brief by Veterans First.[2]

SUMMARY OF ARGUMENT

Wrote the dissenting member of the panel below, "[t]he implications of this holding are staggering." *National Federation of the Blind v. Federal Trade Commission*, 420 F.3d 331, 354 (4th Cir. 2005) (Duncan, J., dissenting); Pet. App. 39a.

And indeed, the majority opinion below unleashes chaos on a whole series of longstanding First Amendment principles articulated by this Court. First, and as further addressed in this Brief, it guts several First Amendment safeguards, including the application of strict scrutiny review and the burden of the Government to show an evidentiary justification for speech regulation. Second, as explained by Petitioners, the Fourth Circuit's "FTC jurisdiction" rationale for imposing burdensome speech restrictions, exclusively on charities using telefunders contravenes the First Amendment requirement of neutral justification for speaker-based selective regulation of fully protected charitable speech. Essentially, the Fourth Circuit held that because an agency lacks complete jurisdiction, it is constitutional for it to underinclusively discriminate against those within its jurisdiction.[3]

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[2] True and correct copies of the consents are attached to this Amicus brief.

[3] There is no limit to the potential reach of this faulty logic. For example, this reasoning could be extended to permit the Department of Veterans Affairs to curb the constitutional speech or voting rights of veterans in a manner putting them at a disadvantage vis-à-vis other

The majority opinion below similarly eviscerates the protections of the Equal Protection clause applicable to the Federal Government through the Fifth Amendment. According to the Fourth Circuit, the Government may avoid the constitutional promise of Equal Protection simply by cleverly interpreting (or, indeed, crafting) agency jurisdictional restrictions to permit regulation of only one of two similarly situated speakers.

These constitutional infirmities of the Fourth Circuit's decision have already been embraced and taken to new extremes by a split panel of the Eighth Circuit in *Fraternal Order of Police v. Stenehjem*, 431 F.3d 591 (8th Cir. 2005). In *Fraternal Order of Police*, the Eighth Circuit approved a North Dakota law enforcing the State's do-not-call list against charities using telefunders, but not to other charities—again without *any* evidence supporting the application of the State's do-not-call list to charities using telefunders or justifying the different treatment of charities. Unfortunately, the Eighth Circuit's decision is a logical extension of the constitutional errors by the majority below, and cripples the ability of small charities to conduct telephonic charitable solicitation.

In addition to its dangerous constitutional implications, as a practical matter, the Fourth Circuit's decision immediately jeopardizes the ability of smaller, resource-limited charities like Veterans First to educate the public and solicit donations, by imposing upon them added burdens that larger, more popular charities avoid, such as the maintenance of expensive company-specific do-not-call lists, calling time restrictions and additional disclosure requirements. These added burdens

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citizens; or to permit a State's Department of Social Services to require food stamp recipients to report their receipt of food stamps to prospective employers or insurers, thus placing them at a disadvantage. Permitting the Government to restrict the constitutional liberties of citizens on an agency-by-agency basis contravenes the fundamental principles of our Federal Constitution.

contravene the First and Fifth Amendments, both of which prohibit the Federal Government from discriminating arbitrarily against speech by small or less popular charities that often must engage the services of telefunders to communicate successfully with potential donors and fund their missions.

ARGUMENT

A. The Fourth Circuit Panel Majority Abandoned The Strict Scrutiny Standard Of Review Applicable To Charitable Speech Regulations Under The First Amendment

This Court and other Circuits have always applied the most exacting scrutiny to content-based regulations of charitable speech. *See, e.g., McConnell v. Federal Election Com'n*, 540 U.S. 93, 140 (2003) (noting that the Court has applied "strict scrutiny" to solicitation restrictions that require fundraisers to disclose particular information); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (noting that content-based speech restrictions always require strict scrutiny); *Mainstream Marketing Services, Inc. v. Federal Trade Comm'n*, 358 F.3d 1228, 1236-37 (10th Cir. 2004) (reserving the more lenient standard of intermediate scrutiny for telemarketing restrictions on commercial speech).

The Fourth Circuit's majority dismissively cast aside both the importance and the substance of the strict scrutiny standard of review. Indeed, the Fourth Circuit cavalierly shirked its responsibility to define the standard it was applying, stating: "It is unclear whether this standard amounts to 'strict scrutiny' (as the charities allege) or the less stringent 'intermediate scrutiny' (as the FTC urges). The district court believed it was applying intermediate scrutiny. . . ." *Nat'l Fed'n of the Blind*, 420 F.3d at 338 n.2; Pet. App. 12a.

The Fourth Circuit's refusal to acknowledge and apply the appropriate standard of review unavoidably invites other Courts to slacken their application of the strict scrutiny

standard and allow more extensive speech suppression than would be allowed under strict scrutiny review. This approach has already been embraced by a split panel of the Eighth Circuit in *Fraternal Order of Police v. Stenehjem*, in which the Eighth Circuit recently applied *intermediate scrutiny* to approve a North Dakota law that completely bans charitable speech by charities using professional fundraising firms, but not by other charities, to individuals registered on the State's do-not-call list. 431 F.3d 591.

The Fourth Circuit's refusal to apply strict scrutiny analysis to regulation of charitable telephone solicitation also conflicts with the decision of the Tenth Circuit in *Mainstream Marketing*, in which the Tenth Circuit applied an intermediate standard of review to uphold the constitutionality of the National do-not-call list as applied to *core commercial* calls—because the regulations did not apply to charitable calls and therefore did not require the higher level of strict scrutiny review. 358 F.3d at 1233.

B. The Fourth Circuit Panel Majority Absolved The Government From Any Evidentiary Burden To Support Charitable Speech Regulation

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *Playboy Entertainment*, 529 U.S. at 816-17 (citing cases).

The Fourth Circuit's decision eradicates the Government's evidentiary burden to justify its regulation of charitable speech. The decision upheld the FTC's regulation of charitable solicitation by professional solicitors—despite the FTC's admitted failure to present any evidence justifying any regulation of charitable telephone solicitations; much less any distinction among charitable speakers. The dissent noted, "[t]he FTC, when pressed at oral argument, conceded that there existed 'no *empirical evidence*' in the administrative

record to support this assumption [that a professional telefunder's financial interest in obtaining greater contribution leads it to be more likely to engage in fraudulent behavior than a non-professional solicitor]. In fact, the FTC conceded that the only evidentiary support the agency had for solely applying the TSR to telefunders was its intuitive "commonsense" ***assumption*** that telefunders commit fraud more frequently." *Nat'l Fed'n of the Blind*, 420 F.3d at 352 (Duncan, J., dissenting); Pet. App. 36a—37a (emphasis added).

This Court has never allowed the Government to justify regulation of charitable speech based upon mere "assumptions." *See Playboy Entertainment*, 529 U.S. at 819 (holding that the Government failed to carry its burden where it offered "anecdotal evidence" but "little hard evidence" and "no proof" justifying its speech regulation); *cf. Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 624-25 (1998) (Scalia, J., concurring) (emphasizing that the First Amendment would even prohibit a Government fraud action against a professional fundraiser, but for the substantial record evidence of specific fraudulent misrepresentations). *See also Mainstream Marketing*, 358 F.3d at 1233 (relying on the FTC's evidence of the harassing effects of the commercial speech at issue, and the admitted absence of comparable evidence for charitable solicitations, to uphold the application of the national do-not-call registry to commercial callers only).

C. The Fourth Circuit Panel Majority Failed To Properly Consider, Or Apply, The Promise Of Equal Protection

"The Federal Government has a duty under the Due Process Clause of the Fifth Amendment to guarantee to all its citizens the equal protection of the laws." *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 876 (1984) (Marshall, J. dissenting) (citing *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Bolling v. Sharpe*, 347 U.S. 497 (1954)). *See Adarand Constructors v. Pena*, 515 U.S.

200, 231-32 (1995) (upholding "important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years . . . [standing] for an 'embracing' and 'intrinsically sound' understanding of equal protection 'verified by experience,' namely, that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws.")

This Court has long recognized that the selective speech regulation of professional charitable fundraisers "necessarily discriminates against small or unpopular charities," since it is this subcategory of charities that "must usually rely on professional fundraisers." *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 799 (1988).

Under the applicable strict scrutiny test, a regulation satisfies equal protection promise only if the regulation is "narrowly tailored" and "furthers a compelling government interest." *See Adarand Constructors*, 515 U.S. at 227 ("'[A] free people whose institutions are founded upon the doctrine of equality' should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." (quoting *Hirabayoshi v. United States*, 323 U.S. 81, 100 (1943)).

The panel majority below failed to consider the first requirement—that the regulations be narrowly tailored, and completely abandoned the second requirement—that the regulation be shown to further a compelling governmental interest. As noted above, the FTC did not present *any* evidence showing any government interest whatsoever fur-

thered by regulating telephone charitable solicitation by professionals. Indeed, the only "governmental interest" even mentioned by the majority is the FTC's excitement over the opportunity to regulate telephonic charitable solicitation afforded by an ambiguous provision in the Patriot Act relating to fraudulent—not professional—charitable solicitations. (It is disputed whether the subject provisions of the Patriot Act actually grant the FTC jurisdiction over non-fraudulent charitable solicitation.) The FTC's enthusiasm to regulate charitable solicitation by professional fundraisers is not, in itself, a compelling governmental interest supporting such regulation.

D. A Sample Of The Constitutional Havoc The Fourth Circuit's Decision Has Already Wrought: *Fraternal Order Of Police v. Stenehjem*

The Fourth Circuit's ink was barely dry before multiple citations to its 2-to-1 decision below turned up in a 2-to-1 decision of the Eighth Circuit in *Fraternal Order of Police v. Stenehjem*. In *Fraternal Order of Police*, two judges of an Eighth Circuit panel cited the majority opinion below as constitutional authority for the proposition that charities using professional fundraisers may be treated differently from charities using volunteers. In *Fraternal Order of Police*, the Eight Circuit upheld a North Dakota law imposing the State's do-not-call list to ban calls by charities using professional fundraisers—but not other charities—without even considering the constitutionality of applying do-not-call restrictions to charitable speech, and without any evidentiary basis for such discriminatory regulation. For these novel departures, the *Fraternal Order* majority simply cited and "join[ed] in" the Fourth Circuit opinion below, purporting to find its "analysis persuasive"—without remotely acknowledging that the "analysis" simply *abandoned* any substantive "neutral justification" requirement, in deference to *FTC jurisdiction*.

Of course, the Fourth Circuit's reliance on "FTC jurisdiction" to displace the government's First Amendment burden of demonstrating a neutral justification for discriminating among speakers—in addition to being legally wrong in its own context below—has *logically nothing whatsoever* to do with the laws of North Dakota or any purported justification for them. Nonetheless, the Eighth Circuit majority decision in *Fraternal Order of Police* incongruously cited the majority below for the strikingly generic proposition that "the distinction between professional charitable solicitors and in-house charitable solicitors" is "permissible," 431 F.3d at 598—apparently regardless of context, evidence, neutral justification, burden, or proof.

From this unlikely premise, derived from the case below and untethered to any applicable rationale, the *Fraternal Order* majority perpetuated each of the constitutional errors noted in the preceding sections. It overtly declared confusion about what standard of scrutiny properly applies to North Dakota's discriminatory ban on professional (but not in-house) charitable solicitation—even asserting that this Court has never specified what level of scrutiny applies to various regulations of pure charitable speech—and ultimately concluded that mere "intermediate scrutiny" should apply. 431 F.3d at 597. But as noted above, that is clearly incorrect; this Court applies the most exacting strict scrutiny to content- or speaker-based regulation of charitable speech. Similarly, because it apparently read the opinion below as a blanket sanction of discrimination against speech by small charities employing professional fundraisers, the *Fraternal Order* majority required no evidence from the government in support of the distinction, effectively rejecting this Court's repeated admonition that the Government bears the evidentiary burden of justifying its restrictions on fully-protected speech.

Compounding and extending these errors, in order to reconcile (in the absence of any substantive Government defense) the obvious underinclusiveness of North Dakota's